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Nos. 72-1653 and 73-288

In the Supreme Court of the United States

OCTOBER TERM, 1973

HONORABLE JOHN F. DOOLING, JR., UNITED STATES DISTRICT JUDGE, PETITIONER

v.

JOHN HILBERT, III

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH SCAFO

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

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guaranteed by the Sixth Amendment. The Court of Appeals for the Second Circuit, contrary to the views of all other circuits, has adopted and approved rules requiring such dismissal. Respondents do not seriously deny the importance of the issue or make any convincing showing that the decisions of the Second Circuit in these two cases are sound. Rather, they raise a series of technical objections which, they contend, make these cases inappropriate vehicles for deciding the issue, and also argue that these decisions "will have a minimum effect, if any, on matters now pending in the District Court" (Scafo Opp. 5; Dooling Opp. 2–3).

The issue that these petitions present is an important and major one that requires resolution by this Court. Respondents' attempts to avoid the issue are unconvincing.

1. Both respondents seek to minimize the impact of the Second Circuit's Speedy Trial Rules, upon which the dismissals here were predicated, on the ground that those rules have now been superseded by local district court rules issued pursuant to Rule 50(b), Fed. R.Crim.P.

But neither respondent denies that the Rule 50(b) plans adopted by the district courts in the Second Circuit are substantially similar to the Speedy Trial Rules involved in the present cases. Both mandate dismissal for delay based on the passage of an arbitrary period of time, without regard to a demand for a speedy trial or prejudice to a defendant's ability to defend himself (Dooling Pet. 24). Indeed, the basic

similarity of the Circuit Council Rules and the Rule 50(b) plans recently caused the court of appeals to observe that, "although this case [involving a dismissal of an indictment] is governed by the prior Prompt Disposition Rules, the decision bears also on the proper interpretation of the District Plans." *United States* v. *Lasker,* Nos. 73–1370, 73–1102—73–1108, decided June 11, 1973 (C.A. 2), slip op. p. 4115, n. 1.[1]

While the petitions may appear also to challenge the power of the Circuit Council to exercise any rule-making authority under 28 U.S.C. 332, the purpose of that discussion was to demonstrate how far the Circuit Council had exceeded its proper function here in legislating a rule which not only grants unprecedented authority to the district courts, but is wholly at odds with Rule 48(b), Fed.R.Crim.P., which this Court adopted with the concurrence of Congress and which has the force and effect of law (18 U.S.C. 3771).

But whatever power the Circuit Councils (as well as the district courts under Rule 50(b)) may have to promulgate procedural rules to speed the consideration and determination of criminal cases, that power

[1] The statement in the majority opinion in *Dooling* (Pet. App. A, p. 3a), cited by Hilbert (Opp. 3), that "[t]he importance of the issue has been somewhat diminished as a result of the recent adoption * * * of new [Rule 50(b)] rules," refers solely to the issue whether in fact the Circuit Council Rules compelled dismissal with prejudice (Dooling Pet. App. A, pp. 2a–3a). We agree that the importance of this issue of construction—which we do not raise here—has been diminished by the adoption of the Rule 50(b) plans, which expressly compel dismissal with prejudice (Dooling Pet. App. G, pp. 45a–46a).

is subject to certain limitations. Since the exercise of these rule-making powers is not subject to prior congressional approval—as is the case when this Court promulgates rules (18 U.S.C. 3771)—the rule-making power must be exercised in a manner "not inconsistent with the statutes [including rules promulgated by this Court] or constitution of the United States." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9–10; 28 U.S.C. 2071. As the Court of Appeals for the Third Circuit recently held in sustaining the rule-making power of the Circuit Councils:[2]

> Nor do we accept appellant's contention that a judicial council lacks rule-making power. His argument that this would destroy uniformity flies in the face of the fact that every court of appeals, not to mention many district courts, has its own local rules. *The caveat is that such rules must not conflict with rules that have been made effective nationally.* See *In re Mandell*, 2 Cir., 1934, 69 F. 2d 830. [Emphasis supplied.]

The same limitations apply to the rule-making functions delegated to the district courts pursuant to Rule 50(b).

2. Respondent Hilbert argues, however, that the Circuit Council Speedy Trial Rules and the Rule 50(b)

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[2] *In the Matter of Imperial "400" National, Inc.* v. *Nolan*, Nos. 72–1566 and 72–1920 (C.A. 3), decided April 23, 1973, petition for certiorari pending (No. 73–204). The portion of the opinion quoted above appears at p. A–11 of the Circuit Council's petition for certiorari.

plans adopted by all the district courts within the Second Circuit are not inconsistent with Rule 48(b) of the Federal Rules of Criminal Procedure.

He claims first that Rule 48(b) is not breached by a rule compelling dismissal with prejudice because Rule 48(b) "permits dismissal with or without prejudice" (Dooling Opp. 4).[3] We did not, however, suggest that Rule 48(b) precludes dismissals with prejudice. We

[3] Hilbert also takes comfort from the fact that the Circuit Council Rules were cited "favorably" in *Barker* v. *Wingo*, 407 U.S. 514 (Dooling Opp. 4), and in the reference to those rules in the Advisory Committee Notes accompanying Rule 50(b) (Dooling Opp. 7). But it was not until after *Barker* was decided and Rule 50(b) was promulgated that the Second Circuit in *Hilbert* v. *Dooling* "announced that dismissals under Rule 4 are with prejudice" (*United States* v. *Rollins*, 475 F. 2d 1108, 1109 (C.A. 2)). Since the Circuit Council's rule did not state that dismissal with prejudice was mandatory, and since the Chief Judge of the Circuit and the able district court judge in *Hilbert* v. *Dooling* did not so read the Council rules, it is difficult to see what satisfaction Hilbert derives from the citation of the rules in *Barker* and the Advisory Committee Notes. Moreover, the Model Plan, which was prepared and circulated by the Judicial Conference and adopted by most district courts (Dooling Pet. 22–23, n. 13), expressly rejects dismissal as a remedy for noncompliance, and this Court in *Barker* did not purport to decide the validity of the Circuit Council rules, it expressly stated that a dismissal for delay in prosecution was an "unsatisfactorily severe remedy" (407 U.S. 522). Such a dismissal is justified only in the case of a violation of the Speedy Trial Clause, because "such severe remedies are not unique in the application of constitutional standards" (See *Strunk* v. *United States*, No. 72–5521, decided June 11, 1973, slip op. p. 6). Here, of course, it is not alleged that the Speedy Trial Clause was violated.

urge rather that such dismissals are justified only upon a showing that the Speedy Trial Clause has been violated or that a trial would be incompatible with due process because of the delay. Hilbert cites no authority, other than the holding below, which supports a dismissal with prejudice in any other instance. On the contrary, the cases in every circuit—including the Second Circuit—hold otherwise (Dooling Pet. 19–20).

Hilbert next suggests that the Second Circuit's mandatory dismissal rule does not interfere impermissibly with the discretion of the district court under Rule 48(b) because that discretion is limited by the Circuit Council's rules only "when the Government fails to explain why a delay in prosecution of more than six months is not an 'unnecessary delay'" (Dooling Opp. 5). This contention turns Rule 48(b) on its head. The rule, by its terms, is addressed solely to the situation in which there *has been* an unnecessary delay and does not otherwise contemplate dismissal of prosecutions. The discretion to dismiss thus arises only upon a finding of unnecessary delay—and inherent in the existence of "discretion" to dismiss must be a similar "discretion" not to dismiss (unless there has been a "speedy trial" violation of constitutional dimensions).

The extent to which that discretion has been interfered with is demonstrated in *Scafo*. There, despite the district court's finding that "this court does not consider it in the public interest to dismiss charges

of theft at the airport unless they are truly trivial or the delays are clearly inexcusable or there has been real prejudice to the defendant" (Scafo Pet. App. D, pp. 34a–35a), the court of appeals applied its mandatory dismissal rule simply because more than six months had elapsed from the date of arrest.

More significantly, Hilbert's suggestion that, in order to *avoid* dismissal under Rule 48(b), the government must explain why a particular delay is not an unnecessary delay, likewise ignores the holding of every other circuit that in order to *justify* a dismissal—particularly where, as here, no demand for a speedy trial was made or required[4]—there must be a showing that the delay was either deliberate and oppressive or that the defendant was prejudiced (Dooling Pet. 19). Here there was no demand for a speedy trial, no deliberate or oppressive delay, no prejudice to the respondents' right to a fair trial, and no basis for a dismissal under Rule 48(b) or the Sixth Amendment. If, therefore, as the court of appeals held (Dooling Pet. App. A, p. 15a) and Hilbert suggests, all that is involved is a construction of Rule 48(b), then there is a conflict among the courts of appeals which should be resolved.

3. Our petition for certiorari in *Scafo* (Pet. 12-13) also notes that the issue raised here is of immediate

[4] Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Rule 8 (Dooling Pet. App. E, p. 33a); Plan for Achieving Prompt Disposition of Criminal Cases, Rule 7 (Dooling Pet. App. G, p. 48a).

practical concern because of the interpretation which *Scafo* and other cases placed on both the Circuit Council Speedy Trial Rules and the Rule 50(b) plans. These cases hold that a notice of readiness is an essential prerequisite to compliance with those rules (Scafo Pet. App. A, pp. 14a–15a). As we represented in *Scafo,* this holding will affect approximately 271 cases in the Eastern District of New York, where until recently it was not the *uniform* practice of the United States Attorney's Office to file a notice of readiness. The likelihood of a dismissal with prejudice, we noted, will encourage numerous motions to dismiss by defendants who took no action to demand a speedy trial. This in turn will involve numerous time-consuming hearings[5] and may ultimately result in the freeing of scores of defendants for reasons wholly unrelated to their guilt or innocence or their ability to obtain a fair trial.

Respondent Scafo claims that this representation is not correct because in *United States* v. *Pierro,* 478 F. 2d 386 (C.A. 2), "the United States Court of Appeals applauded the United States Attorneys Office

[5] In discussing the nature of the hearing held in *Scafo*, the district court observed (Pet. App. D, p. 25a, n.):

"The hearing directed by the Court of Appeals took about two hours. Preparation for the hearing, study of the record and briefs, and drafting and revision of this memorandum and findings required in the aggregate more than another full court day, while decision of civil matters was delayed."

Moreover, even the filing of a timely notice of readiness apparently does not preclude a defendant from obtaining a hearing as to whether the United States Attorney was in fact ready for trial. *United States* v. *Pierro*, 478 F. 2d 386, 388, n. 2 (C.A. 2).

for the Eastern District for adopting a position of issuing a Notice of Readiness" (Scafo Opp. 6). But this policy was not adopted on a mandatory basis until March 1973, when the Court of Appeals first intimated that only "exceptional circumstances" could justify "the Government's failure to file a notice of readiness." *United States* v. *Rollins,* 475 F. 2d 1108, 1111 (C.A. 2). Until then, there had been no indication that a communication of readiness was essential to compliance with either the Circuit Council Rules or the Rule 50(b) plans.[6]

4. In our petition in *Scafo,* we observed that the appeal which led to the dismissal of the indictment in that case was argued and decided after the court of appeals, sitting *en banc* in *Hilbert* v. *Dooling,* had construed the Speedy Trial Rules to compel a mandatory dismissal and had sustained their validity.

[6] It is true, as Scafo notes (Opp. 7), that "a written notice of readiness" is not essential and that an oral communication of readiness will apparently suffice. But while an "oral notice of readiness" at the time of arraignment is the accepted practice in district courts outside the Eastern and Southern Districts of New York, "where the caseload is relatively less burdensome" (*United States* v. *Pierro*, *supra*, 478 F. 2d at 389, n. 3), such a practice was not employed in the Eastern District where defendants are normally arraigned before a "miscellaneous judge," who sets bail and appoints counsel. Only after arraignment is the case automatically assigned to a district judge for trial. Although it is not inconceivable that an oral notice may have been given in some of these 271 cases, the United States Attorney advises us that the principal method of communicating readiness for trial was by written notice and that the "oral notice of readiness" exception will not save a substantial number of the 271 cases in which no written notice was filed.

Accordingly, the same issue was not raised again when the appeal in the instant case was heard by the court of appeals. Respondent Scafo argues, however, that the United States is precluded from raising the issue here because, on the first appeal by Scafo from the judgment of conviction, it had not expressly challenged the validity of the Second Circuit's rules as an alternative ground for affirmance. In addition to this claim, which is unsupported by the meager authority cited by Scafo, he alleges that the failure to raise the issue on the second appeal—which resulted in the decision below—likewise precludes the United States from raising the claims here.

The principle that this Court ordinarily will not consider issues not raised below is a doctrine of judicial administration. It is a discretionary principle, not an immutable rule. The decision whether to apply it in a particular case rests in the sound discretion of this Court. The policy considerations underlying the principle are inapplicable in this case, where the court of appeals *en banc*—albeit in a previous case—had expressly considered and rejected the government's arguments, and where it would have been fruitless to have raised the issues in this case either on the first or second appeal. Under these circumstances, given the benefit of the court of appeals' reasoning on this issue and a clear record which requires no additional findings of fact, there is no basis for arguing that the issues should not be considered by this Court. See *Silber* v. *United States*, 370 U.S. 717; *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412; cf.

Blonder-Tongue v. *University Foundation,* 402 U.S. 313, 320–321, n. 6.

CONCLUSION

These cases present important questions of constitutional law and criminal law administration which this Court should decide. The petitions for writs of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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